

Symposium: Digital Archives: Navigating the Legal Shoals

Copyright Issues and Section 108 Reform

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It is really nice to be here. This is a subject that is very near and dear to my heart, in part because of the Section 108 Study Group that I worked on for almost three years.¹ I was at the Library of Congress and worked with the National Digital Information Infrastructure and Preservation Program (“NDIIPP”). I was sort of the in-house manager, slash administrator, slash secretary for the Section 108 Study Group.² It was a group put together by the Library of Congress and the Copyright Office to look at revising § 108, which is the section of the Copyright Act for exceptions for libraries and archives, and to update it for the new technological era.³ My job on the study group was really just to make sure the work got done, help facilitate it, and I wasn’t allowed to have any of my own opinions—at least I tried. Peter Hirtle and June Besek, who were in the group, are laughing because I tried, but sometimes I think my opinions came through.

It is nice to have an opportunity to reflect on the report two years after it was completed, done and filed away. And it does feel a little bit like it was filed away. The Copyright Office, I know, has been looking at it quietly. Maria can attest to that. They’ve been extraordinarily busy between Google Books, the new electronic

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1. 17 U.S.C. § 108 (2006). “The purpose of the Section 108 Study Group is to conduct a reexamination of the exceptions and limitations applicable to libraries and archives under the Copyright Act, specifically in light of digital technologies. The group will study how section 108 of the Copyright Act may need to be amended to address the relevant issues and concerns of libraries and archives, as well as creators and other copyright holders. The group will provide findings and recommendations on how to revise the copyright law in order to ensure an appropriate balance among the interests of creators and other copyright holders, libraries and archives in a manner that best serves the national interest.” SECTION 108 STUDY GROUP, THE SECTION 108 STUDY GROUP REPORT, at ii (2008), *available at* <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.

2. 17 U.S.C. § 108.

3. *Id.*

copyright system and just a whole hoard of different things, but that's really not the only reason it hasn't been acted on yet.⁴ One of the reasons for the lack of attention to the report is that there has been a lack of support among the library associations for legislation to reform § 108.⁵ It's hard to make it a priority, with so many other priorities. I thought I was becoming sympathetic to the view that we'll just rely on fair use—particularly with some of the recent cases (not so recent any more), *Perfect Ten v. Google* and some of the other fair use cases that have opened up fair use to more systematic en masse-type uses.⁶ I was starting to think, "Well, maybe there's a point there." The fear is that once you open up a statute for legislation you might lose ground. But then I reread the report for a conference just a few weeks ago down at the University of North Carolina honoring Lolly Gasaway, who was one of the co-chairs of the Section 108 Group. It was the first time I'd reread the report in quite a while and I was really impressed at how many of the recommendations are really just plain old common sense; they are no-brainers. Section 108 is really out of date.⁷ It just does not apply to digital technologies and many archivists and librarians are begging for more clarity.

The provisions just don't work in today's environment. So, let's update them, but let's find a way to do it that works for everyone. And I think there is a way. One of the things that Marybeth Peters, the Register of Copyrights, said several years ago, before the report was done when we were meeting with ARL and ALA, was, "Well, if you don't want to revise § 108 and update it for digital works, let's just get rid of it then."⁸ I don't know if she was really serious, but the response to that was, "Gasp, we don't want to get rid of it." So, clearly there is something in § 108 that serves libraries and archives well.⁹

I'm going to start by explaining a little bit why we have some of these express exceptions for libraries and archives. They are not new; they go back to the 1930s. We've basically been having the same conversation for a really long time. And let me just make a point of clarification: if I use the term "libraries," I apologize. I mean it as a shortcut for libraries and archives, and in some cases also museums.

Let me first talk a little about why we have a § 108 in the first place.¹⁰ It was enacted with the 1976 Act, as many of you know.¹¹ But that is not the first time that we heard about legislation for an exception for library and archive use.¹² In the

4. See *Authors Guild v. Google*, No. 05 Civ. 8136 (S.D.N.Y. Nov. 19, 2009) (granting preliminary approval of amended settlement agreement).

5. 17 U.S.C. § 108.

6. *Perfect 10, Inc. v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006), *rev'd in part and remanded sub nom.*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

7. 17 U.S.C. § 108.

8. *Id.*

9. *Id.*

10. *Id.*

11. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2598 (codified at 17 U.S.C §§ 101–810).

12. See generally MARY RASENBERGER & CHRISTOPHER WESTON, OVERVIEW OF THE LIBRARIES AND ARCHIVES EXCEPTION IN THE COPYRIGHT ACT: BACKGROUND, HISTORY, AND MEANING (2005), available at [http://www.section108.gov/docs/108BACKGROUND.PAPER\(final\).pdf](http://www.section108.gov/docs/108BACKGROUND.PAPER(final).pdf).

early twentieth century, photography was used to make copies for scholars.¹³ There were machines called photostats that were set up in some libraries that took snapshots of pages.¹⁴ There was concern about this copying both among archivists and librarians: they wanted to make sure that they weren't running afoul of copyright.¹⁵ They didn't want to get sued. And there was also some concern among publishers.¹⁶ When an amendment was first proposed in 1935, the Book Publishers' Association ultimately decided to oppose the legislation.¹⁷ I have a quote here from Harry Lydenberg, who was on the board of the Publishers' Association, but was also the director of the New York Public Library. He said that a library exception would require "so great a need of hedging it about with restriction, whereas and provisos, as to endanger, if not nullify, its usefulness."¹⁸ I think that is kind of interesting because that's sort of what we are hearing people say today. There were others who wanted the certainty and kept pushing for legislation. In 1935, instead of legislation, there was a Gentlemen's Agreement between the Book Publishers' Association and the American Council of Learned Societies.¹⁹ It permitted libraries, archives and museums to make a single reproduction for a scholar who stated in writing that the use was for research.²⁰ This became the fair use standard that was more or less applied until the '76 Act.²¹

There were a number of other bills that were introduced between 1935 and the '76 Copyright Act.²² I just mentioned there was a memo from the Council of Learned Societies supporting legislation that said that for scholars, you absolutely need this right to make free copies as part of the normal research process, but "this right to copy should never be confused with the right to publish."²³ It's an interesting quote because it reflects the same dynamic that's going on now. Publishers say, "Yes! We agree you need to make copies for research. But once you start putting things on the Internet—once you start publishing our works—you're competing with us."

Obviously for unpublished works, a lot of the material that archives deal with is

13. *Id.* at 2.

14. *Id.* at 2–3.

15. *Id.* at 3.

16. *Id.* at 3–4.

17. Peter B. Hirtle, *Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935*, J. COPYRIGHT SOC'Y U.S.A. 545, 574 (2006).

18. Letter from Harry M. Lydenberg, Dir., N.Y. Pub. Library, to Robert C. Binkley, professor and Chairman, Dept. of History, Flora Stone Mather Coll. of W. Reserve Univ. (Mar. 27, 1935), *quoted in* Hirtle, *supra* note 17, at 576.

19. *See* Hirtle, *supra* note 17, at 596–8; RASENBERGER & WESTON, *supra* note 12, at 6–8.

20. *See* RASENBERGER & WESTON, *supra* note 12, at 7.

21. *See* Hirtle, *supra* note 17, at 596–8.

22. Bills that included a library exception to copyright were introduced in 1936, 1940, 1944, 1963 and in the various Copyright Revision bills leading up to the 1976 Act, including those in 1964–65, 1967–68, 1969, 1973 and 1974. *See* RASENBERGER & WESTON, *supra* note 12, at 8–9, 12–20.

23. Memorandum on Copyright on Behalf of Scholarship Presented by the Joint Committee on Materials for Research (July 15, 1938) (on file with the U.S. Copyright Office), *quoted in* S. COMM. ON THE JUDICIARY SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, 86TH CONG., STUDY NO. 15: PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES 55 (Comm. Print 1959).

different because you are not competing with publishers. In any event, the photocopiers came on the scene in the early '60s and started to change the dialogue a little bit.²⁴ There was an increase in Inter-Library Loans ("ILL").²⁵ Publishers viewed the use of photocopiers as potentially a serious issue, having a significant economic impact on their works, and they were very concerned.²⁶ At the same time, libraries were finding the Gentlemen's Agreement unworkable.²⁷ So, negotiations started for the '76 Act, and they continued for fifteen years.²⁸ At various times the libraries and archives said, "No we don't want an exception." At various times the publishers did. In the end, we got § 108.²⁹

So why did the Library and the Copyright Office charge a study group to update § 108?³⁰ Section 108 was obviously drafted with a lot of materials in mind; but because it was enacted in 1976, it does not cover the types of copies that are made in a digital environment. As you all know, copies are made whenever a digital work is accessed—transferred for any use, for curating, cataloguing or simply access. Digital preservation requires lots of copying for migrating, normalizing data, refreshing, replicating it. And you usually want to keep it in multiple locations. So, you're making copies all the time—whenever you touch digital work. At the same time, you know your users now expect e-access. They are doing their research on the Internet. You can't tell students, "Sorry, you've got to come into the library." As far as I know, they don't go to the library anymore. At the same time, the risks to right holders have increased exponentially. We almost laugh now at the thought that photocopiers in libraries were so controversial. Now, the risks are so much greater—that the end user could take the material and put it on a peer-to-peer service, basically make it available throughout the world.

I will go over the major recommendations of the Section 108 Study Group final report.³¹ The report is divided up into three parts.³² Recommendations for legislative change—these are concrete recommendations for legislation, with details about what the legislation should look like.³³ Then you have conclusions, which I think, in any other report would be called "recommendations," but these are areas where the group was not able to agree on the details of what legislation would look like.³⁴ Third, there were some "other" issues that were looked at where it was agreed that there was no change necessary or appropriate now, or there is just no agreement.³⁵

One thing I want to note about the group is that it was based on a unanimous

24. RASENBERGER & WESTON, *supra* note 12, at 10.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 11–20.

29. 17 U.S.C. § 108 (2006).

30. SECTION 108 STUDY GROUP, *supra* note 1.

31. *Id.*

32. *Id.*

33. *Id.* at 31–94.

34. *Id.* at 95–112.

35. *Id.* at 113–31.

consensus decision-making model, which meant that for any recommendation all members of the group—there were nineteen—had to agree.³⁶ The members of the group tried to cover the whole gambit—all the different rights industries, libraries, archives, scholars. If we could have changed one thing about the process of the group, we realized that’s something that we would have changed, because there were a number of issues where there were just one or two holdouts and it just made it much harder to actually get to an agreement.

The recommendations relate to the eligibility provisions and preservation and replacement provisions in §§ 108(b) and (c).³⁷ Then, there are some other miscellaneous recommendations.³⁸ For instance, the group recommended an amendment to the provision for “unsupervised reproducing equipment,” which in 1976 meant photocopiers in libraries or archives, but now would also include cell phones or hand-held scanners.³⁹ Under the current provisions, libraries and archives should post a notice on the photocopiers advising users that copies may be subject to copyright law.⁴⁰ The group recommended the notice be placed in a public place to notify users that copies made by any “reproduction equipment” may be subject to copyright law.⁴¹ I must say, the group got a lot of giggles over the phrase “unsupervised use of reproduction equipment.”⁴²

Part II or the Conclusions mainly relate to §§ 108(d) and (e) and (i).⁴³ These are the “copies for users” provisions. The main recommendation was that you need to permit the making of more than one copy so that you can have digital distribution of copies.⁴⁴ But you have to have some kind of adequate protections. What those protections should look like was not agreed upon by the group. Some thought it was enough to just have the user say that they won’t download or further distribute. Some of the right holders thought you might want technological protection measures. That was a big issue. Then in Part III, there were the other outcomes.⁴⁵ I won’t talk about those, but if you are interested, they are described in the report.⁴⁶ It is still available online on the § 108 website.⁴⁷

Let’s start with the eligibility recommendation.⁴⁸ The current provision, § 108(a), doesn’t define libraries and archives.⁴⁹ The only criterion is that the copy cannot be made for direct or indirect commercial advantage.⁵⁰ You can be a for-profit library or archive, or part of a for-profit institution, but the copy cannot be for

36. *Id.* at 2.

37. 17 U.S.C. §§ 108(b), (c) (2006).

38. SECTION 108 STUDY GROUP, *supra* note 1, at 31–94.

39. *Id.* at 92.

40. 17 U.S.C. § 108(f).

41. SECTION 108 STUDY GROUP, *supra* note 1, at 91–92.

42. 17 U.S.C. § 108(f).

43. *Id.* 108(d), (e), (i); SECTION 108 STUDY GROUP, *supra* note 1, at 95–112.

44. SECTION 108 STUDY GROUP, *supra* note 1, at 98, 108.

45. *Id.* at 113–31.

46. *Id.*

47. *Id.*

48. *See* SECTION 108 STUDY GROUP, *supra* note 1, at 31–42.

49. 17 U.S.C. § 108(a) (2006).

50. *Id.*

any kind of commercial purpose.⁵¹ The library or archives also has to be open to the public or to researchers in a specialized field and you have to use a copyright notice.⁵² The recommendation for eligibility was to tighten up the eligibility requirements so that you knew who was going to be using these exceptions and were comfortable with that. Then you could make the exceptions a little broader. One of the concerns was that libraries and archives are terms that are thrown around particularly for Internet uses to mean all kinds of things. And the group wanted to make it clear that what we are talking about are really traditional types of libraries and archives that have a public mission, collections that are lawfully acquired and have library or archives type services. So, there are some additional eligibility criteria that the group recommended be added.⁵³

Another very easy agreement for the group to come to was that museums should be covered by § 108. Museums were in the Gentlemen's Agreement in 1935; and they were in much of the early legislation that was introduced.⁵⁴ But when it came to negotiating the '76 Act, they were not at the table, basically. They saw themselves as dealing in objects—things like stuffed birds or whatever—that you are not making copies of. But now museums have a lot of digital works. They are making copies and need to make copies as well as libraries and archives.

A recommendation was also made to allow outsourcing of the exceptions. I don't want to go into detail here, but it is not permitted expressly under the current statute. Obviously, libraries and archives are already outsourcing a lot of the activities that fall under the exceptions, so the recommendation was to make that express and permissible.

There were also some recommendations for preservation and replacement, and the group spent a lot of time talking about these. Section 108(c) is a provision that allows libraries and archives to make replacement copies of published works in a collection.⁵⁵ Section 108(b), on the other hand, is really the archives exception.⁵⁶ The provision allows an institution to make preservation copies of unpublished works for the purposes of preservation, security and deposit in another research institution.⁵⁷ In order to make replacement copies under § 108(c), the original has to have been lost, stolen, damaged, deteriorated or stored in an obsolete format (i.e., a floppy disk), and you to make reasonable efforts to buy a used replacement copy at a fair price.⁵⁸ That's not true for § 108(b).⁵⁹ Both § 108 (b) and (c) have a limit of three copies—that was the standard at the time for microfiche.⁶⁰ It really does not work for digital works. As I said earlier, you're making a lot of copies of works in order to preserve, replace or even just to maintain a work. So, obviously

51. *Id.* § 108(a)(1).

52. *Id.* § 108(a)(2).

53. See SECTION 108 STUDY GROUP, *supra* note 1, at 34.

54. Hirtle, *supra* note 17, at 596–8.

55. 17 U.S.C. § 108(c).

56. *Id.* § 108(b).

57. *Id.*

58. *Id.* § 108(c).

59. *Id.* § 108(b).

60. *Id.* §§ 108(b), (c).

that needs to be changed for the digital environment. So, the group recommended that the three-copy limit be replaced with a limited number of copies as reasonably necessary for the preservation or replacement.

Both of §§ 108(b) and (c) have a restriction for on-premises access for users to digital copies, and this includes physical digital copies as well—DVDs or CDs.⁶¹ The group recommended that you should permit off-site lending, definitely for the physical digital copies such as DVDs or CDs.⁶² And it was generally agreed that you could permit e-access to these replacement and preservation copies, but there was no agreement in the group on what the conditions for that e-access would be—specifically whether technical protection measures would be required. I think the librarians and archivists in the group, based on their experiences with the TEACH Act, reacted very strongly against having any kind of required technological measures.⁶³ I wonder if the off-site electronic access wouldn't be less of an issue today. Things are still changing so quickly with the technologies. And right holders in general seem a little more comfortable now with online access. I think, partly, we've seen the Google Books Settlement where publishers got comfortable with offsite access, in part because of all the restrictions Google agreed to—many of which are similar to the group's recommendation.⁶⁴ Because everything is being made available online now, you can maybe push the electronic access a little more now.

The group also recommended a preservation-only exception.⁶⁵ As I noted, for published works there is no preservation exception per se. But for digital copies, you really need to think about preserving them before they become destroyed or damaged because once you start losing bits, you can't replace them. You need to keep updating and replicating—maintaining them all the time. The group agreed that there has to be a preservation exception for published works, but carefully tailored it and in some ways may have overburdened the exception a little bit with too many belts and suspenders—albeit some of them are quite essential. The proposed exception is limited to “at risk” published works, which I think the librarians and archivists agreed that that's all that they really want to preserve anyway (depending on how you define at risk, of course).⁶⁶

The proposed exception is also limited to specially qualified libraries and archives.⁶⁷ The reason for that is that digital preservation is really hard and not many institutions can do real digital preservation and serve as trusted repositories. So, the idea was that to be eligible for this exception you have to at least utilize best practices for digital preservation. I won't go through the qualification criteria, but

61. *Id.*

62. SECTION 108 STUDY GROUP, *supra* note 1, at 64.

63. Technology, Education, and Copyright Harmonization (“TEACH”) Act, 17 U.S.C. §§ 110(2), 112(f) (2006).

64. *See Authors Guild v. Google*, No. 05 Civ. 8136 (S.D.N.Y. Nov. 19, 2009) (granting preliminary approval of Amended Settlement Agreement).

65. SECTION 108 STUDY GROUP, *supra* note 1, at 69–70.

66. *Id.* at 69, 71–73.

67. *Id.* at 69, 73–76.

you can look at them in the report. They're typical repository best practices. There was a lot of debate, though, about whether a library or archives should self-qualify, such as the current § 108(a), which seems to make a lot of sense to me, or whether you have some kind of third-party certification, which would add another layer.⁶⁸ I don't have time to go into that in detail, but there were some really interesting ideas that came out of that.

These preservation copies would not be access copies; you would still have the original copy for access. There is some limited access to keep the works alive for research, but essentially they're backup copies—they're there to make replacement copies.

This is the last thing I'm going to mention, the website preservation exception.⁶⁹ At the Library of Congress at the time, we were doing a lot of web preservation, as were other partners in the NDDIP program.⁷⁰ This was viewed as an important activity because what is put up on the Web is here today, gone tomorrow. And yet, it's an excellent record of our current state of affairs. So, librarians and archivists wisely saw a great need to capture and preserve websites. The Internet Archive is sweeping up the Internet on a regular basis, but there is also a need to create curated collections of web content. This was an exception that everyone readily agreed to: all libraries and archives should be able to capture publicly available online content for the purposes of preservation and research. In other words, libraries and archives should be able to copy and preserve anything that's not restricted by access controls. The group did recommend an opt-out though, so that if a copyright holder does not want their content either captured or accessed, they could opt out of either capture or access.⁷¹ But, the group agreed, government and political sites should not be allowed to opt out, and the Library of Congress has the right to collect everything, regardless of whether a site has opted out to ensure a complete record.⁷²

Given that my time is up, I think I will stop there. Thanks.

68. By self-qualification, the group means that the library or archives would decide for itself whether it met certain statutory criteria and whether it thus could take advantage of the exception. This is how the current § 108 exceptions in general work. There is no process a library or archives must go thru to be qualified; it simply decides whether it meets the criteria in § 108(a). A right holder who disagrees with that assessment can always bring a lawsuit for infringement, and the library or archives would then have to prove in defense that it qualified under this exception or another. See 17 U.S.C. § 108(a).

69. SECTION 108 STUDY GROUP, *supra* note 1, at 80–87.

70. *Id.* at 3; see also DIGITAL PRESERVATION, <http://www.digitalpreservation.gov> (last visited Oct. 20, 2010).

71. SECTION 108 STUDY GROUP, *supra* note 1, at 80.

72. *Id.*